IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 398 of 1994.

Judgment reserved on 6.11.2006

Date of decision: 24.11.2006.

Duni Chand and another …Appellants.

Versus

Puran Chand …Respondent.

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the appellants: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.

For respondent : Mr. K.D. Sood, Advocate, with Ms. Sunita Sharma, Advocate.

Surjit Singh, Judge

This appeal, by the plaintiffs, is directed against the judgment and decree dated 30.9.1992 of the trial Court and dated 12.5.1994 of the First Appellate Court, whereby their suit for possession of the following properties, which they instituted against Puran Chand, respondent / defendant, has been dismissed:-

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Whether reporters of Local Papers may be allowed to see the Judgment?

"(a) One room 20' X 17' shown in red colour with letter 'A' of the ground floor in house shown in the site plan by letters 'FGHI' with the length and breadth 40' X 33'.

(b) One room 17' X 12' and one kitchen 12' X 8' in the upper storey which is shown by blue colour and with the letter 'C' and 'B' in house shown in the site plan by letters 'FGHI' 40' X 33'.

(c) One cow-shed 15' X 14' with Verandah 15' X 6 ½ ' which are shown in the site plan by red colour and by letters 'E' and 'X' all, i.e. property described in 'A-B-C' situated in Khasra No. 348 min, in Khata Khatauni No. 169 / 263 and Khasra No. 347 min, Khata Khatauni No. 172 / 267, in Phati Duwara, Kothi Baragarh, Tehsil and District Kullu, Jamabandi for the year 1986-87.

(d) One Suari 38 ½ ' X 22' surrounded by North – Suari Dev Prakash, South Suari and Machine of Hari Chand, East – public path, West – house and threshing floor of Shyam Lal, as shown in the site plan by letter 'D' situated in Abadi in Phati Duwara, Kothi Baragarh, Tehsil & District Kullu."

2. Admitted facts are that late Oat Ram, father of the plaintiffs and the respondent / defendant, was a co-owner of the aforesaid properties, in addition to land comprised in various Khewats. He made a Will, according to which some specified properties were bequeathed to the plaintiffs and the defendant. The plaintiffs are sons of said Oat Ram from one wife and the defendant from another. The Will was challenged by the defendant / respondent by filing a suit. That suit was dismissed and the Will was upheld.

3. As per the Will, the property comprised in Khewat No. 139, together with a house standing thereon, was bequeathed in favour of the plaintiffs. Defendant / respondent was given one Bigha seven Biswas area being 27 / 223 share in Khewat No. 141 and the rest of the share of the testator in this Khewat No. 141 was given to the plaintiffs. Both the plaintiffs

and the defendant were given equal shares in the share of the testator in Khewat Nos. 138 and 142. Rest of the entire property, including the property comprised in Khewat No. 139, on which there stood a house, was given to the plaintiffs. As regards the house standing on Khewat No. 139, the Will provided that the defendant would continue to remain in occupation of that portion of the house, which was occupied by him at the time of execution of the Will, till he constructed his own house.

4. The plaintiffs / appellants filed the suit claiming that the suit property was the part of the house property, which according to the recitals of the Will was in occupation of the respondent / defendant at the time of execution of the Will, but had been given to them under the Will and since the defendant / respondent had constructed a house of his own about three – four years prior to the institution of the suit and he was liable to deliver the possession of the suit property to them.

5. Suit was contested by the respondent / defendant on two counts. First, he denied that he had constructed his own house, as alleged in the plaint. Secondly, he pleaded that even at the time of execution of the Will by his father, he was owner to the extent of 1/5th share in the suit property in his own right, because two sons of a pre-deceased sister of his father, who had inherited 1/5th share in the suit property and other property, held by his father as a co-owner, had sold their share to him by a sale deed in the year 1971.

6. The two Courts below have returned the finding that the respondent / defendant, being a co-sharer in the Khata on a portion of which stands the house and other structures, which are the subject matter of the present litigation, has the right to continue in possession till partition

takes place. Also, it has been held by the two Courts below that the respondent / defendant is not proved to have constructed his own house. Consequently the suit has been dismissed.

7. Appeal was admitted by this Court on the following substantial questions of law:-

(1) Whether the defence raised by the defendant – respondent in the present suit was hit by the principles of constructive resjudicata?

(2) Whether the learned lower Appellate Court erred in not taking into consideration the additional evidence adduced by the plaintiff – appellants Exhibits PX & PY?

(3) Whether the judgements and decrees passed by both the learned Courts below are vitiated on account of non-consideration of effect of judgement passed in Civil Suit No. 50/87 between the same parties?

8. I have heard the learned counsel for the parties and perused the record.

9. The plea of resjudicata cannot be said to be available to the plaintiffs / appellants on the strength of the earlier suit that was filed by the respondent / defendant, because the question involved in that suit, was whether deceased Oat Ram had executed any Will or not. The question whether the respondent / defendant was a co-sharer with his father in the bequeathed property and whether the claimed share of the respondent / defendant could not have been bequeathed, was not involved in that litigation. Therefore, the respondent / defendant's plea that he was a joint owner with his father in respect of the suit property to the extent of 1/5th share, cannot be said to be barred by principle of resjudicata. The question is accordingly answered against the appellants / plaintiffs.

10. The plaintiffs / appellants were permitted to lead additional evidence in the form of certified copies of the plaint and the plan attached therewith which the respondent filed in the earlier suit, challenging the Will. The plaintiffs / appellants tendered in evidence the certified copies of the plaint and the plan attached with the plaint. The learned Appellate Court, after having admitted the aforesaid documents, without any objection from the respondent, did not use these documents as evidence with the observation that the same had not been properly proved. The learned Appellate Court was not justified in rejecting the two documents on this count, particularly when the same had been admitted in evidence without any objection as to the mode of proof by the respondent / defendant. However, these two documents do not have any relevance in determining the question involved in this case, because these documents were intended to be proved to support the contention that the plea raised by the defendant / respondent was barred by resjudicata. It has already been held hereinabove, while determining question No. 1, that the plea is not barred by the principle of resjudicata. So, this question is also answered against the appellants / plaintiffs.

11. As already noticed, the question involved in the earlier suit was whether Oat Ram had executed a Will or not. The respondent / defendant filed a suit seeking declaration that the Will, set up by the appellants / plaintiffs, was not valid. That suit was dismissed. In that suit the question whether the respondent / defendant was a joint owner with the testator in the suit property, was neither raised nor decided. Also, there was no need for raising such a question in that suit. The only question involved in that suit was whether the estate of deceased Oat Ram had

devolved upon his heirs by rule of inheritance or on the basis of the Will set up by the appellants / plaintiffs, who were defendants in that suit. Therefore, this question is also answered against the appellants / plaintiffs.

12. An attempt was made by the learned counsel for the appellants / plaintiffs to assail the concurrent finding of the two Courts below that the respondent / defendant had been joint owner to the extent of 1/5th share in the suit property with his father late Oat Ram. The finding is based upon the entries in the revenue papers as also a deed of sale, which was executed in favour of the respondent / defendant by two persons, named Devinder and Tej Ram, in the year 1971, when Oat Ram, father of the parties, was alive. The Will was executed by Oat Ram in the year 1983, or say, much after the respondent / defendant became joint owner with him. The Will executed by Oat Ram could not have affected nor did it affect the right of the respondent / defendant as a co-owner to the extent of 1/5th share in the suit property. The respondent / defendant is thus a co-owner in the suit property to the extent of 1/5th share and, therefore, he has a right to remain in its possession till the partition takes place.

13. For the foregoing reasons, appeal is dismissed.

November 24, 2006 (BC) **(Surjit Singh)**
Judge